In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 10.

MABEL GILLESPIE,
Administratrix of the Estate of Daniel E. Gillespie, Deceased,
Petitioner,

v.

UNITED STATES STEEL CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

RESPONDENT'S BRIEF.

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September 4, 1964.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—PHONE: 621-5647

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RESPONDENT'S BRIEF.

Petitioner, in this seaman's case, asks the Court to reverse a number of its admiralty decisions.

Unless the Court shall do so, Petitioner concedes, the decision below should be affirmed.

QUESTIONS PRESENTED.

Petitioner's abstract statement of questions is essentially correct, but, in the context of this record, unrevealing. In the light of the record, the questions presented may be stated as follows:

I. Whether the Court should overrule *Lindgren v. United States* (1930), 281 U. S. 38, and hold that recovery for the death of a seaman may be had, not only as Congress provided in the Jones Act, but also under the Wrongful Death Act of a state.

II. Whether the Court should also overrule *Chicago, Burlington & Quincy Railroad Company v. Wells-Dickey Trust Company* (1927), 275 U. S. 161, and hold that under the Federal Employers Liability Act (which the Jones Act says "shall apply" to seamen's cases) recovery may be had for the benefit of all of the statute-named beneficiaries collectively, rather than seriatim, even though the statute expressly says the recovery shall be for the benefit:

> "of the surviving widow or husband and children of such employee; *and, if none,* then of such employee's parents; *and, if none,* then of the next of kin dependent upon such employee * * *." [1]

III. Whether the Court also should overrule *The Corsair* (1892), 145 U. S. 335, and hold that (apart from damages under the Jones Act for death) recovery may be had for "pain and suffering prior to death" even though no appreciable time elapsed between the accident and death.

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[1] Emphasis supplied throughout the brief.

STATEMENT OF TH CASE.

This case comes here on the pleadings. There has been no trial.

The case awaits trial in the Northern District of Ohio on Petitioner's allegations under the Jones Act. The portion of the case that comes here turns on Petitioner's claims to new relief, not heretofore allowed by admiralty law and admittedly denied by this Court's decisions, reversal of which Petitioner seeks.

—The Accident.

Daniel Gillespie was a seaman on a Great Lakes freighter.

He was returning from shore leave while his vessel lay moored at the dock in the Black River in Lorain, Ohio. The amended complaint says that as he (R. 2):

> "reached for the ladder to board the vessel, his feet slipped on the wet ore and wet surface of the dock, he lost his balance, fell into the Black River at the National Tube Dock and drowned."

Gillespie, aged 38, was not married. He was survived by his mother, who was appointed administratrix, by a brother, and by three sisters, two married and one single. (R. 1.)

—The Claims Asserted.

In addition to the claims for relief under the Jones Act, the Petitioner in the amended complaint averred (R. 1, 5):

(a) A claim to recover under the Ohio Wrongful Death Act which, if *Lindgren* (1930), 281 U. S. 38, stands, is not available to Petitioner.

(b) A claim to recover not only for the benefit of the mother, who (because the decedent left neither spouse nor children) is the sole beneficiary named in the statute, but also for the benefit collectively of the brother and sisters who, if *Wells-Dickey* (1927), 275 U. S. 161, stands, are barred as beneficiaries.

(c) A claim for pain and suffering prior to death, which (since it is not claimed that any appreciable time intervened between the fall and the death) if *The Corsair* (1892), 145 U. S. 335, stands, states no justiciable claim.

—How the Case Comes Here.

When the District Court, Judge Paul Jones, in the Northern District of Ohio, on motion, struck the foregoing claims from the amended complaint, leaving only the Jones Act claims standing (R. 15, 16), Petitioner, without complying with 28 U. S. C. § 1292, relating to interlocutory orders, appealed to the Court of Appeals for the Sixth Circuit. (R. 16.)

In response to motion to dismiss the appeal for want of a final appealable order (R. 17), Petitioner filed in the Court of Appeals an original action for a writ of mandamus to compel Judge Jones to overrule the motion to strike from the amended complaint. (R. 19.)

The Court of Appeals, instead of dismissing, decided the case on the merits, and in an opinion by Judge McAllister, joined by Judges Weick and O'Sullivan, (R. 29) affirmed the rulings of Judge Jones. 321 F. 2d 518. This Court granted certiorari. 375 U. S. 962.

SUMMARY OF ARGUMENT.

I. *Petitioner admittedly cannot prevail except upon wholesale overruling of this Court's cases.* Petitioner:

(a) Calls for reversal of three cases Petitioner considers incorrectly decided.

(b) Says that, once the law is revised to conform to Petitioner's views, the Court will have to "explain or reconcile" six more of its decisions.

(c) Proposes to upset the law, which has been settled for 34 years, that the Jones Act bars a seaman's resort to state remedies.

To accept Petitioner's proposals would be to re-write the admiralty law and, at the same time, to produce a tidal wave that would engulf this Court's work of half a century in establishing that the Federal Employers Liability Act bars resort to state remedies.

The Court should reject the invitation to re-do the past. Here, if ever, is the time to apply *stare decisis*.

II. *The Lindgren rule that the Jones Act excludes state remedies in seamen's cases should be adhered to.* Petitioner's argument to the contrary should be rejected because:

First. Petitioner's attack upon the rule rests on spurious grounds. The Jones Act provides the remedy for death in seamen's cases; to import into the Act remedies under state statutes would not only reject law of long standing but ignore history as well. Since, as is clear, the Jones Act excludes state remedies while the seaman lives, it, by equal reasoning, bars state remedies after death.

Second. If the issue were open, it should today be decided as it was in *Lindgren*. Congress said it intended the

Federal Employers Liability Act to "supplant" state laws. When, 12 years later in the Jones Act, Congress said the Federal Employers Liability Act "shall apply" to seamen's cases, it knew that this Court had held the statute excludes state-provided remedies. As a matter of history, therefore, Congress must have intended to exclude state remedies, which is what *Lindgren* held.

Third. Even if *Lindgren* were, as Petitioner claims, "incorrectly decided," the Court should adhere to the rule of that case. Congress has been content with it for 34 years. If there be need for change, Congress can attend to it, and there is no need to call on this Court to legislate. Especially is this so since revision now of this Court's construction of the Jones Act would generate critical problems in the wider area touched by the Federal Employers Liability Act.

III. *Since the mother survived, more remote kin are barred as beneficiaries*—the *Wells-Dickey* rule should be adhered to. This is the plain meaning of the statute; it has been so construed by this Court in at least three cases. Unless those cases are now to be overruled, an affirmance of the courts below should follow.

IV. *When death follows immediately, claim for pain and suffering does not arise*—the *Corsair* rule should be adhered to. The decedent fell from the dock and drowned. It is not claimed that any appreciable period intervened between the accident and death. Under such circumstances this Court has at least three times held that no claim for pain and suffering arises. Unless those cases too are to be overruled, the courts below should be affirmed.

ARGUMENT.

The cases Petitioner would reverse were correctly decided; but, were it otherwise, the Court at this late date should reject the invitation to re-write the law.

I. PETITIONER ADMITTEDLY CANNOT PREVAIL EXCEPT UPON WHOLESALE OVERHAULING OF THIS COURT'S CASES.

It will be well, before appraising Petitioner's argument, to note the extent to which, if Petitioner is to prevail, the Court is called upon to overrule the past.

1. Court Is Importuned to Re-Style Admiralty Law.

This Court's work of many years in delineating seamen's rights in event of injury or death, is assailed—

—(a) Petitioner Asks That Decisions in Three Areas Be Overruled.

Three decisions of this Court, if they stand, are fatal to Petitioner's appeal. Their rejection, in this case, would have consequences far beyond the area of admiralty jurisdiction, as will be seen. To begin with, note that—

Lindgren (1930), 281 U. S. 38, Petitioner says (p. 6) "was incorrectly decided." In *Lindgren* this Court considered (p. 44) "It is plain" that the Jones Act covering injuries and death of seamen (p. 44):

> "necessarily supersedes the application of the death statutes of the several States."

Petitioner's claim under the Ohio Wrongful Death Act thus admittedly fails unless *Lindgren* is overruled.

Wells-Dickey (1927), 275 U. S. 161, Petitioner says (p. 6) "should be overruled." In *Wells-Dickey* this Court held that under the statute (p. 163):

> "There are * * * three classes of possible beneficiaries. But the liability is in the alternative. It is to one of the three; not to the several classes collectively."

Here, since a beneficiary of one class, the mother, survived, the beneficiaries in the third class (a brother and three sisters) are admittedly excluded unless *Wells-Dickey* is overruled.

The Corsair (1892), 145 U. S. 335, is the third of the decisions the Court (p. 40) "is urged to reconsider." In *The Corsair* (where an interval of "about ten minutes" intervened between the accident and death) the Court held no claim was stated for pain and suffering prior to death because (p. 348):

> "there is no averment from which we can gather that these pains and sufferings were not substantially contemporaneous with her death and inseparable as matter of law from it."

So, here, Petitioner's claim for pain and suffering prior to death fails unless *The Corsair* is overruled.

The overruling of these three decisions (and the cases that have followed them), although essential to the success of Petitioner's appeal, is not the end of the task Petitioner gives the Court.

—(b) Court Is Told It Will in Addition Have to "Explain" Six More Cases.

Petitioner says the overruling of the three cases above named will not be enough. The Court, in reshaping the admiralty law, will still face a task of major proportions. Petitioner says (p. 34, Note 42) the Court will need to:

"explain or reconcile the decisions"

in six more of its cases; five of them less than five years old. The decisions Petitioner says will need explanation or reconciliation are:

Southern Pacific Company v. Jensen (1917), 244 U. S. 205;
The Tungus v. Skovgaard (1959), 358 U. S. 588;
United New York and New Jersey Sandy Hook Pilots Association v. Halecki (1959), 358 U. S. 613;
Hess v. United States (1960), 361 U. S. 314;
Goett v. Union Carbide Corp. (1960), 361 U. S. 340;
Kossick v. United Fruit Co. (1961), 365 U. S. 731.

Concerning the reconciliation and re-examination of these cases, Petitioner says that unless the Court wishes to undertake it now (p. 34):

"this task will be left for another day."

Petitioner's attack on this Court's cases has its storm center in admiralty. However, the Court, in considering whether the invitation to re-write the law should be accepted, should keep in mind that—

2. Petitioner's Construction Would Unsettle Law in Other Areas.

The Jones Act, 46 U. S. C. § 688, which the Court construed in *Lindgren* (1930), 281 U. S. 38, merely says that the Federal Employers Liability Act:

"shall apply"

to seamen's cases. The Jones Act does no more than say that whatever may be the rights given by the Federal Employers Liability Act, they shall apply also to suits for injury to or death of a seaman. Obviously, therefore, whatever the Court may say about the Jones Act will be a construction of the Federal Employers Liability Act. Equally obviously, if the Federal Employers Liability Act (when applied to seamen's cases by force of the Jones Act) gives the seaman remedies under state statutes, the same statute, when applied to railroad workers, must give them like rights under state statutes.

This Court's cases say that the Federal Employers Liability Act *excludes* remedies provided by state statutes. Hence, if a contrary meaning is now—in response to Petitioner's invitation—to be given to the Federal Employers Liability Act when applied to seamen's cases by the Jones Act, what this Court has for more than 50 years asserted is the law, will be undone.

The rule that the Federal Employers Liability Act excludes remedies under state statutes has been law at least since *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156. There this Court held (p. 158):

> "If the Federal statute [i.e., the Federal Employers Liability Act] was applicable, the state statute [in this case the Texas death statute] was excluded * * *."

The Court, over the years, has adhered to this construction. The Court so ruled in:

North Carolina Railroad Company v. Zachary (1914), 232 U. S. 248, where the Court held the Federal Employers Liability Act barred remedies under the North Carolina act.

St. Louis, Iron Mountain & Southern Railway Company v. Craft (1915), 237 U. S. 648, where the Court held (p. 655) "the state statute is not applicable because superseded, as respects the class of cases to which this one belongs, by the Federal Employers Liability Act."

New York Central Railroad Company v. Winfield (1917), 244 U. S. 147, where the Court held the statute foreclosed resort to remedies under the New York Workmen's Compensation law.

Erie Railroad Company v. Winfield (1917), 244 U. S. 170, where the Court held the statute barred resort to a New Jersey law which, contrary to the Federal Employers Liability Act, provided for compensation without regard to negligence.

New York Central & Hudson River Railroad Company v. Tonsellito (1917), 244 U. S. 360, where the Court held the remedy provided by the statute is exclusive and that no other may be added by the law of a state.

Northern Coal & Dock Company v. Strand (1928), 278 U. S. 142, where the Court considered it settled that Congress has (p. 147) "provided a method under which the widow of Strand might secure damages resulting from his death, and that no state statute can provide any other or different one."

South Buffalo Railway Co. v. Ahern (1953), 344 U. S. 367, where the Court, speaking of this statute, observed that (p. 372) "local law may not gnaw at rights rooted in federal legislation."

Unless the foregoing cases, too, are now to be overruled, it is difficult to see how anyone can say that under the Jones Act there is any room left for remedies under state acts. With all but the last of these decisions before it, the Court in *Lindgren* (1930), 281 U. S. 38, could not well have avoided its holding that the Jones Act (p. 44):

"necessarily supersedes the application of the death statutes of the several States."

Manifestly, overruling of the decisions Petitioner attacks would have consequences not limited to admiralty, but must result in convulsion as well in the wider area touched by the Federal Employers Liability Act.

If ever, here is the time to apply the rule of *stare decisis*.

On this ground alone the Court should reject the invitation to re-do the past. It should, instead, affirm the judgment below.

Apart from *stare decisis*—

II. LINDGREN RULE THAT JONES ACT EXCLUDES STATE REMEDIES SHOULD BE ADHERED TO.

Lindgren (1930), 281 U. S. 38, is in no way out of harmony with this Court's decisions.

Cases where the Court has dealt, in admiralty, with state Wrongful Death Acts and other state-provided remedies, are, of course, here inapplicable. In those cases there was no Federal statute. They were not seamen's cases. The Jones Act, which is here before the Court, and which

deals with seamen's cases, was not there involved. Those cases, here irrelevant, are: *The Tungus v. Skovgaard* (1959), 358 U. S. 588; *United New York and New Jersey Sandy Hook Pilots Association v. Halecki* (1959), 358 U. S. 613; *Hess v. United States* (1960), 361 U. S. 314; *Goett v. Union Carbide Corp.* (1960), 361 U. S. 340. From them Petitioner can draw no nourishment.

Nor does *Lindgren* (1930), 281 U. S. 38, mar the symmetry Petitioner professes to seek in the admiralty law. The logical consistency of the admiralty law, in this area, would indeed be destroyed by the rejection of *Lindgren*. As will be seen—

1. Petitioner's Attack on Lindgren Rests Upon Spurious Grounds.

The beguiling argument urged by Petitioner, that it is illogical to deny after death a remedy for breach of the warranty of seaworthiness the seaman would have had if he had lived, should not obscure the fact that—

—(a) Petitioner Is Not Without Remedy For Death—Jones Act Provides It.

The Jones Act, 46 U. S. C. § 688, provides the remedy in case of the death of a seaman. *Kernan v. American Dredging Co.* (1958), 355 U. S. 426. In this case the Jones Act claim has not been denied. It awaits trial in the District Court. The Jones Act provides in seamen's cases in event of death what land-based law provides ashore through Wrongful Death Acts.

Petitioner, however, pretends to find the Court involved in inconsistencies so monstrous as to call for overruling wholesale the Court's work of half a century. Since a seaman can recover for breach of the warranty of seaworthiness if he lives, Petitioner argues that the seaman's

personal representative, after death, should have the same right under the Wrongful Death Act of the state. The argument is inverted. And most illogical. In truth—

—(b) State Remedies, Denied Living, Are Also Barred After Death.

It is clear that for injuries short of death the seaman must look to the maritime law. He may not look to state-provided remedies.

Petitioner's difficulty is not merely with this Court's cases. Petitioner is in equal trouble in explaining how it can be argued that even though state remedies may not be looked to for redress of the seaman's injuries if he lives, they may be looked to if he dies. *The law that governs in each case is the same; it does not change with death.* In neither case does it embrace state-provided remedies.

Note next that—

2. If Question Were Still Open, It Should Be Decided Same Way.

If *Lindgren* (1930), 281 U. S. 38, had not been decided, and the issue were now to come to the Court as an original question, it should be decided as it was in *Lindgren*.

The reason is that admiralty law is in the Federal domain. No state statute may intrude under any circumstances—except by Federal permission. Here there is neither permission nor room for state-provided remedies because Congress has made the Jones Act remedy the adjunct to traditional admiralty law in seamen's cases. Congress *excluded* state-provided remedies. This is abundantly clear because—

—(a) Congress Said It Intended to Exclude State Remedies.

When Congress enacted the Federal Employers Liability Act, 45 U. S. C. § 51, on April 22, 1908, Congress had before it the report of the House Judiciary Committee (House Report No. 1386, 60th Congress, 1st Session, April 4, 1908) which expressly said the statute (p. 3):

> "will *supplant* the numerous State statutes on the subject * * *."

No one suggested anything to the contrary.

The intent was to "withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws," this Court pointed out in *New York Central Railroad Company v. Winfield* (1917), 244 U. S. 147. The Federal Employers Liability Act, the Court said (p. 149):

> "was drafted and passed shortly following a message from the President advocating an adequate national law covering all such injuries and leaving to the action of the several States only the injuries occurring in intrastate employment. *Cong. Rec.*, 60th Cong., 1st sess., 1347. And the reports of the congressional committees having the bill in charge disclose, without any uncertainty, that it was intended to be very comprehensive, to withdraw all injuries to railroad employees in interstate commerce from the operation of varying state laws and to apply to them a national law having a uniform operation throughout all the States."

Accordingly, when Congress 12 years later, in 1920, by the Jones Act, 46 U. S. C. § 688, said the earlier statute "shall apply" to seamen's cases, without any hint that it wished to give the statute narrower scope in seamen's cases than it had expressly said the statute would have in

railroad cases, Congress necessarily said it intended to bar state remedies in seamen's cases as it had in railroad cases.

Moreover—

—(b) Congress Knew Statute Had Been Held to Exclude State Remedies.

When Congress in 1920 said the Federal Employers Liability Act "shall apply" to seamen's cases, that statute had already been construed by this Court to exclude state-provided remedies. The Court had so held in *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156; *North Carolina Railroad Company v. Zachary* (1914), 232 U. S. 248; *St. Louis, Iron Mountain & Southern Railway Company v. Craft* (1915), 237 U. S. 648; *New York Central Railroad Company v. Winfield* (1917), 244 U. S. 147; *Erie Railroad Company v. Winfield* (1917), 244 U. S. 170; *New York Central & Hudson River Railroad Company v. Tonsellito* (1917), 244 U. S. 360.

With this adjudicated construction of the statute before it, Congress, had it intended to give the statute a different scope when applied to seamen's cases, must surely have said so. Congress did not do so. It, therefore, will not do for Petitioner now to argue that Congress intended the limiting construction Petitioner would attribute to the Act.

3. Even If *Lindgren* Were Erroneously Decided, Court Should Retain Rule.

Strong policy considerations suggest that even if *Lindgren* (1930), 281 U. S. 38, were deemed erroneously decided, the Court should nevertheless adhere to the rule of that case.

—(a) Case Has Now Been Law for More Than Third of Century.

Although Petitioner (p. 13) deems *Lindgren* "a hoary blunder," it has met the test of time. The case has survived for 34 years.

To undo it now calls for reasons, not adjectives, because—

—(b) Congress, Were It Dissatisfied, Could Change Law—It Has Not Done So.

Petitioner makes a strong showing (pp. 18-20) of continuing Congressional awareness of, and interest in, seamen's rights. The fact that Congress, alive to these rights, has not chosen to change the Jones Act, justifies the conclusion it is satisfied with the construction put on it by the courts. This alone is assurance that the rule responds to the needs of the times.

The blandishments by which Petitioner would urge the Court to fashion new rules should be rejected here as they were in *The Harrisburg* (1886), 119 U. S. 199, where the Court—in this very area of the law—responded to a like invitation with the comment (p. 214):

> "as it is the duty of courts to declare the law, not to make it, we cannot change this rule."

—(c) Reversal of Lindgren Would Raise Critical Problems in Railway Field.

If the Federal Employers Liability Act, applied to seamen's cases by the Jones Act, has left room for the operation of state remedies, then by like reasoning it has also left room for state remedies in railroad cases. But, as has been seen, the course of decision for more than 50

years has been the other way. State remedies clearly are barred by the Federal Employers Liability Act.[2]

Accordingly, even if there were merit otherwise in the thesis Petitioner espouses, the collateral effect of its adoption upon the vast area reached by the Federal Employers Liability Act alone would counsel rejection of Petitioner's argument.

In summary—on this point—*Lindgren* was correctly decided. But, even if not, uprooting it now would reduce to debris so much of the law of the last 50 years that the Court should reaffirm the rule and leave to Congress the cure of deficiencies—if any there be.

III. SINCE MOTHER SURVIVED, STATUTE BARS OTHER KIN AS BENEFICIARIES—WELLS-DICKEY RULE SHOULD BE ADHERED TO.

The seaman, leaving neither spouse nor children, is survived by his mother. The statute, therefore, operates to bar the brother and three sisters as beneficiaries. This is because the statute, 45 U. S. C. § 51; says the recovery shall be:

> "for the benefit of the surviving widow or husband and children of such employee; *and, if none*, then of such employee's parents; *and, if none*, then of the next of kin dependent upon such employee * * *."

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[2] *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156; *North Carolina Railroad Company v. Zachary* (1914), 232 U. S. 248; *St. Louis, Iron Mountain & Southern Railway Company v. Craft* (1915), 237 U. S. 648; *New York Central Railroad Company v. Winfield* (1917), 244 U. S. 147; *Erie Railroad Company v. Winfield* (1917), 244 U. S. 170; *New York Central & Hudson River Railroad Company v. Tonsellito* (1917), 244 U. S. 360; *Northern Coal & Dock Company v. Strand* (1928), 278 U. S. 142; *South Buffalo Railway Co. v. Ahern* (1953), 344 U. S. 367.

The statute thus excludes beneficiaries of a remote class if there be beneficiaries in a nearer class. The liability, as Mr. Justice Brandeis, speaking for the Court in *Chicago, Burlington & Quincy Railroad Company v. Wells-Dickey Trust Company* (1927), 275 U. S. 161, observed (p. 163):

> "is in the alternative. It is to one of the three, not to the several classes collectively."

Petitioner, however, says *Wells-Dickey* (p. 6) "should be overruled" because it was decided (p. 37) "without analysis." It is altogether likely this is the first time anyone has said Mr. Justice Brandeis ever decided anything "without analysis."

The *Wells-Dickey* rule was indeed declared earlier in *St. Louis, San Francisco & Texas Railway Company v. Seale* (1913), 229 U. S. 156, 162, and was adhered to in *Poff v. Pennsylvania Railroad Co.* (1946), 327 U. S. 399, where the Court, refusing (p. 401) "to rewrite the statute," held that (p. 402):

> "when Congress made the widow preferred over the parents and both the widow and parents preferred over the next of kin, it barred the deferred classes from recovering by creating a preferred class which could recover."

Unless these three cases are to be overruled, it is clear that the courts below were right, and should be affirmed, in holding the mother the sole beneficiary.

IV. WHERE DEATH FOLLOWS IMMEDIATELY, CLAIM FOR PAIN AND SUFFERING DOES NOT ARISE—CORSAIR RULE SHOULD BE ADHERED TO.

Here the allegation is that the seaman (R. 3):

> "lost his balance, fell into the Black River at the National Tube Dock and drowned."

No claim is made that any appreciable period intervened between the accident and death. In *The Corsair* (1892), 145 U. S. 335, where death also resulted from drowning (p. 348), "about ten minutes" intervened between the accident and the death. The Court held no claim arose for pain and suffering; the pain and suffering was (p. 348) "substantially contemporaneous with her death and inseparable as a matter of law from it."

The point is that, unless an appreciable period intervenes, there is no basis for the claim. In, for example, *Great Northern Railway Company v. Capital Trust Company* (1916), 242 U. S. 144, an intervening period of ten minutes was held insufficient to establish a claim, whereas in *St. Louis, Iron Mountain & Southern Railway Company v. Craft* (1915), 237 U. S. 648, an intervening period of (p. 654) "more than a half hour" was held enough to create a jury issue. However, the Court added (p. 655):

> "the case is close to the border line, for such pain and suffering as are substantially contemporaneous with death or mere incidents to it, as also the short periods of insensibility which sometimes intervene between fatal injuries and death, afford no basis for separate estimation or award of damages under statutes like that which is controlling here."

Unless, then, these three cases are to be overruled, the courts below were right and should be affirmed.

The further argument Petitioner makes (p. 38) that even if "unseaworthiness is not an available theory of liability in actions for wrongful death" the pain and suffering claim should be deemed saved by the Ohio Survival Statute is equally without merit. The Jones Act excludes *all* state statutes—the Survival Statute equally with the Wrongful Death Act.

The Jones Act claims remain and with the trial of those claims the District Court should be permitted to proceed.

CONCLUSION.

The judgment appealed from should be affirmed.

Respectfully submitted,

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September 4, 1964.